Supreme Court, U. S.
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In the Supreme Court of the United States

FEBRUARY TERM 1979

No. 78-1220

FREDERICK W. LEY,

Petitioner,

vs.

PETER CATS, DONALD A. ZIMMER, JIMMIE L. RICE, JOHN A. NORRIS, ANTHONY J. WURM, JURGEN H. ROETTER, JACK A. BLOOMFIELD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeal For the Second Circuit

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DATED: February 2, 1979.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

The petitioner, FREDERICK W. LEY, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeal for the Second Circuit entered in this proceeding on November 6, 1978.

OPINION BELOW

The opinion of the Second Circuit Court of Appeal is unreported. A copy of said memorandum opinion appears as Appendix A hereto. The order of the United States District Court for the Southern District of New York appears as Appendix B hereto.

JURISDICTION

The opinion of the United States Court of Appeal for the Second District affirming the Order of the United States District Court for the Southern District of New York denying petitioner attorney fees and costs was entered on November 6, 1978. A Petition for Rehearing was filed in the Second Circuit Court of Appeals on November 28, 1978. Said Petition was rejected by that Court since, pursuant to Rule 41 of the Rules of Appellate Procedure for the Second Circuit, the mandate in the above action issued immediately upon rendition of Judgment. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Did the Second Circuit Court of Appeal exceed its jurisdiction where, after holding that the District Court had erred in applying federal law to the award of attorney fees and costs, it proceeded to decide the question on the merits rather than to remand the case to the trial court for redetermination under New York State law?

STATEMENT OF THE CASE

Petitioner is the representative of a defendant class which was created by United States Trust Company pursuant to a statutory interpleader action, 28 U.S.C. § 1335, it filed in the United States District Court

for the Southern District of New York in January 1975, to obtain a determining of the rights of adverse claimants to assets held by it as trustee of a pension trust. Jurisdiction was founded solely on diversity of citizenship.

By Order dated July 15, 1976, the District Court certified the action as a Rule 23(b)(1) class action and appointed petitioner the representative over his objections of a nationwide class. The Court also ruled that New York law would control the interpretation and construction of the trust instruments involved.

In light of the fact that this is a Rule 23(b)(1) action, it was perforce essential that the representative would adequately and competently represent the class.

Because of the clear mandate of New York law on the legal and factual issues applicable to the underlying claims, it was not possible to fulfill the mandate of adequate representation by petitioner and his counsel without the guarantee of compensation for their efforts under New York State law.

Moreover, the District Court entered summary judgment under New York law and reserved the decision on petitioner's application for reimbursement of costs, which exceed $5,000.00, and the award of attorney fees based upon an expenditure of more than 700 hours of his attorney's time.

On October 17, 1977, counsel made application to the District Court for reimbursement for costs and for the award of attorney's fees pursuant to New York Civil Practice Law and Rules, Section 8303(a)(4).[1]

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[1] "to the fiduciary or to any party to an action which involves the construction of a will or an intervivos trust instrument, such sums as it deems reasonable for counsel fees and other expenses necessarily incurred with respect to such construction in the action; and the court may direct that the whole or any part of such allowance shall be paid to the attorney rendering the services in the action."

Despite the dictates of New York law, the District Court in its Order dated April 19, 1978 (Appendix B), denied petitioner's application on the basis of federal law.

A timely appeal was filed with the United States Court of Appeals for the Second Circuit and on November 6, 1978, the Court of Appeals sustained petitioner's position that the District Court erred in not deciding the claim for attorney's fees and costs under the law of the State of New York.

Notwithstanding, the Court of Appeals substituted its judgment for that of the District Court and passed on the merits of petitioner's claim for attorney fees and costs, even though those issues were not properly before the court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with a Prior Supreme Court Decision and Undermines the Integrity of the Federal Judicial System.

The United States Court of Appeals for the Second Circuit abused its discretion when it decided the factual issue of attorney fees rather than remanding the case to the trial court, the proper finder of fact in this instance. In so doing, it not only invaded the province of the trial court to an unwarranted degree, but ignored the Supreme Court prohibition against *de novo* review of factual issues on appeal.

It is a well-settled principle of appellate procedure that a reviewing court may not substitute its judgment for that of the trial court by deciding the factual issues *de novo*. The courts of appeal have historically been confined to correcting errors of law. To allow greater latitude would be to emasculate the very foundations of the federal

judicial system, especially in a case such as this where the trial court before whom the action was pending for three years did not even decide the issue.

The decision of the Second Circuit Court of Appeals flies in the face of the holding of this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969):

> ". . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' . . . " (Citations omitted). (At p. 123).

2. The Decision of the Court of Appeals for the Second Circuit Conflicts with the Decisions of other Courts of Appeal.

Where, as here, an error at the trial level has been induced by misapplication of the proper law, the Courts of Appeal for the Third Circuit, the Fifth Circuit, the Sixth Circuit and the Tenth Circuit, have ruled that the proper procedure to follow is remand to the District Court.

In *Ed and Fred, Inc.* v. *Puritan Marine Ins. U. Corp.*, 506 F.2d 757, 758 (5th Cir. 1975), remand was granted

where the Court of Appeals was unable to discern from the record whether the trial court applied federal, Massachusetts or Florida law.

The issue of the propriety of single use zoning was remanded in *Valley View Village* v. *Proffett*, 221 F.2d 412, 418 (6th Cir. 1955), where the trial court erroneously concluded that it was not affected by state law.

Similarly, in *Edina State Bank* v. *Mr. Steak, Inc.*, 487 F.2d 640, 646 (10th Cir. 1974), remand was necessary where the trial court, because of its ruling on liability, did not reach the issue of damages or consider it under state law.

The Third Circuit felt compelled to remand the issue of jurisdiction in *Gallagher* v. *Philadelphia Transp. Co.*, 185 F.2d 543, 547 (3d Cir. 1950), where the district court applied the wrong "domicile" rule.

In the instant case, the decision of the Federal District Court for the Southern District of New York, denying the attorney fee award was based on the erroneous application of federal law to a diversity action. Instead of remanding, the Second Circuit decided the issue *de novo* in direct contravention of the mandate of this court and proper federal judicial procedure, thereby creating a conflict between itself and at least four other Circuit Courts of Appeal.

> "The Federal Rules of Civil Procedure give this Court no power to make new independent findings upon evidence which this Court did not hear. Trial *de novo* is not permitted under our present system, except perhaps in admiralty." *Id.*, at 926.
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> *Panaview Door & Window Co.* v. *Reynolds Metals Co.*, 255 F.2d 920, 926 (9th Cir. 1958).

The prohibition against appelate *de novo* decisions has been extended to attorney fees. The Seventh Circuit, in *Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975), defined the limited scope of appellate review in such situations as follows:

> ". . . While 'we are not permitted to substitute our judgment for that of the District Court,' *Woods* v. *Pielet*, 187 F.2d 453, 456 (7th Cir. 1951), we can review the bases for the decision on fees and revise it if necessary. . . In applying the abuse of discretion standard, we examine findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether they embody or rest upon 'improper standards or procedures'." *Merolar* v. *Atlantic Richfield Co., supra*, 493 F.2d at 295."
> *Id.* at 561-562.

3. The Decision of the Court of Appeals Conflicts With Applicable State Law.

Notwithstanding the Second Circuit's interpretation of New York law, and particularly Section 8303(a)(4) of the New York Civil Practice Law, New York allows the award of attorney fees to unsuccessful litigants where their efforts have assisted the trial court in determining the question of law involved. *In Re Bankers Trust Co.* 47 Misc.2d 776; 263 N.Y.S.2d 209, 210 (1965). *In Re Bittson's Trust*, 41 Misc.2d 5, 244 N.Y.S.2d 926, 930 (1963).

Without these guiding principles, adequacy of representation would not have been insured in this matter and the benefits of res judicata would not have inured to the trust.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Order and Opinion of the Court of Appeals for the Second Circuit.

DATED: February 2, 1979.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

FOR THE

SECOND CIRCUIT

Filed—Nov. 6, 1978

78-7246

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS,
Circuit Judges,

United States Trust Company of New York,
Plantiff,

United States Trust Company of New York,
Plaintiff and Third-Party Plaintiff,

Public Service Mutual Insurance Co., et al.,
Third-Party Defendants.

v.

duPont Glore Forgan Incorporated, et al.,
Defendants.

Peter Cates, et al.,
Defendants-Appellees,

and

Frederick W. Ley,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Since this is a diversity suit, a federal court is compelled to look to state law to determine the propriety of awarding attorney fees and costs. *Alyeksa Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259 n.31 (1975). Ley's claim for fees and costs is controlled by New York State law.

2. Section 8303(a)(4) of the New York Civil Practice Law permits courts to award reasonable counsel fees to any party in an action involving the construction of ambiguous language in a will or intervivos trust. *See, e.g., Kreindler* v. *Irving Trust Co.*, 26 App. Div. 2d 746 (1966), *aff'd*, 23 N.Y.2d 785; 297 N.Y.S.2d 148 (1968). The language of the employee retirement benefits plan before us is not susceptible to differing interpretations. Accordingly, since ambiguous language is not being construed, § 8303(a)(4) does not authorize an award of attorney's fees in this case.

3. Even if federal law were controlling here, it is clear that the application of the common fund doctrine requires that the litigation be successful, *see Alyeska*, *supra*, at 275. Since it "would be a strange inversion if the [common fund] doctrine enabled losers in adversary contests to charge their counsel fees to winners," Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 *Harv. L. Rev.* 1597, 1626-27 (1974), Judge Owen correctly denied Ley's application for attorney's fees.

IRVING R. KAUFMAN

Irving R. Kaufman, Chief Judge.

WILFRED FEINBERG

Wilfred Feinberg

WILLIAM H. TIMBERS

William H. Timbers,
Circuit Judges.

APPENDIX B

MEMORANDUM AND ORDER OF COURT DENYING APPLICATION FOR ATTORNEY'S FEES AND COSTS

Memorandum and Order

Counsel, eminent and skilled, would in all likelihood have prevailed in his class action commenced in California, had it remained there. This was not to be, however, and under the law of New York applicable in this interpleader action, his class was excluded from recovery.

While highly sympathetic to counsel's plight, counsel fees and expenses may only be awarded where counsel's efforts have created a fund for his class, or conferred a benefit on his class or the corporation which inures to his class. *Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970). Conversely, those who receive no benefit from a lawyer's work cannot be compelled to pay for it. *Van Gemert* v. *Boeing Co.*, [Dkt. No. 77-7547, slip op. 2093] F.2d (2d Cir. [March 27], 1978).

I am therefore constrained to deny the motion for fees and expenses.

So ordered.

S/ RICHARD OWEN

U.S.D.J.

4/19/78